NO. 3604

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IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

February Term, 1921

UNITED STATES OF AMERICA,
Plaintiff-Defendant in Error.

vs.

JOHN KOPPITZ,
Defendant-Plaintiff in Error.

Brief of Plaintiff--Defendant in Error

WILLIAM A. MUNLY,
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Filed this.....day of February, 1921,
FRANK D. MONCKTON, *Clerk*

By.....*Deputy Clerk.*

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UNITED STATES OF AMERICA,
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Defendant-Plaintiff in Error.

On Writ of Error from the District Court for the Territory of Alaska, Third Division.

Brief of Plaintiff--Defendant in Error

STATEMENT OF THE CASE.

This Writ of Error arose from a criminal complaint filed in the United States Commissioner's Court for the Territory of Alaska, Third Division, Cordova Precinct, at Cordova, in which the defen-

dant, John Koppitz, was charged as follows:

> "The said John Koppitz in the Territory of Alaska and within the jurisdiction of this Court, did, wilfully and unlawfully, on the 31st day of May, 1920, at Cordova, Alaska be found drunk on the public streets, to-wit: in said Town of Cordova, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America."

It appears from the record of the proceedings in the Justice's (or Commissioner's) Court that the defendant pleaded not guilty and that on such plea, after a trial was had without a jury or demand for a jury and two witnesses were sworn for the prosecution, the defendant was found guilty and sentenced to pay a fine of $250.00, and the costs of the action taxed at $25.05, or by imprisonment in the Federal Jail not exceeding 125 days. Thereafter an alleged notice of appeal and bond on appeal were filed in the District Court of the Third Division, Territory of Alaska, within the required time. When the case came on for hearing in the District Court a motion was filed by the United States Attorney for the dismissal of the appeal from the judgment entered on the 2d day of June, 1920, which motion to dismiss was made on the ground that said alleged notice of appeal was void in that it did not sufficiently identify the judgment, and the Court, after hearing the argu-

ments of the respective counsel, sustained said motion and dismissed said appeal. A judgment was thereupon entered by the District Court on the 29th day of October, 1920, as follows:

> "This matter coming on for hearing upon the motion filed herein by the United States Attorney for the dismissal of the appeal taken herein by the defendant from the judgment entered in the United States Commissioner's Court for the Cordova Precinct, at Cordova, on the 2d day of June, 1920, on the grounds that said notice of appeal filed by the defendant was void for the reason that the same did not describe and identify the judgment entered in said Commissioner's Court, or describe with particularity the crime for which defendant was convicted; and it appearing that the grounds for said motion to dismiss said appeal are good an dsufficient and that said notice of appeal filed by the defendant is void; and it further appearing that a bond for costs on appeal in the sum of Five Hundred Dollars has been filed herein, wherein George Dooley and Tony Lynch are sureties; it is ordered that said appeal be and the same is hereby in all respects dismissed, and it is further ordered that the judgment entered in the Commissioner's Court for the Cordova Precinct, at Cordova, on the 2d day of June, 1920, be entered herein.
>
> It is therefore further ordered that said defendant John Koppitz, pay a fine of two hundred and fifty dollars, and that he be imprisoned one day for every $2.00 of such fine as he shall or fail or refuse to pay, said imprisonment not to exceed one hundred and twenty-five days.
>
> And it is further ordered and adjudged that

the United States of America do have and recover of said defendant John Koppitz, and George Dooley and Tony Lynch, the said sureties on his appeal bond, the costs of this prosecution taxed in the sum of $94.20, and that execution issue for the same."

POINTS INVOLVED BY ASSIGNMENTS OF ERROR.

The Assignments of Error made by Plaintiff in Error are:

First: That the Court erred in entering the judgment of dismissal of the defendants appeal from the Justice's Court.

Second: That the Court erred in entering judgment and sentence against defendant after dismissing defendant's appeal.

Third: That the Court erred in entering any judgment against the defendant based upon the complaint in the action.

Not having a copy of the Brief of the defendant we are obliged to infer from the assignments the points and grounds upon which the defendant relies for a reversal of the judgment in this case, which may be briefly stated as follows:

1st. The prosecution in question was brought under Section 15 of what is known as the Territorial

Prohibition Law, Act of Congress of February 14, 1917, and not under the National Prohibition Law, known as the Volstead Act. The question may then arise as to whether said Section 15 of said Territorial Prohibition Act is in effect, the prosecution claiming in this case that there is nothing in the Volstead Act which covers the crime of public drunkenness, which crime is defined in Section 15 of the Territorial Prohibition Law, and is not therefore repealed by implication by the Volstead Act.

2d. The sufficiency of the alleged notice of appeal.

3d. As the trial of the defendant was had without a jury it may be claimed that such trial was void and unconstitutional.

4th. It may be claimed that the District Court, after the dismissal of the appeal on account of a void notice, is not empowered to render a judgment.

All of these points will be subsequently discussed in the argument.

POINTS AND AUTHORITIES.

I.

Section 15 of the Act of Congress of February 14, 1917, which is a special Act for the prohibition of intoxicating liquors in the Territory of Alaska, is in effect even if the other parts of the Act were superseded by the National Prohibition Law, which latter Act does not cover the crime of public drunkenness. The former Act could only be repealed *pro tanto* by implication.

United States v. Wood, 16 Pet. 342.
Witte v. Shelton, 240 Fed. 265.
Arthur v. Homer, 96 U. S. 137.
Gowen v. Harley, 56 Fed. 973.

II.

The right of appeal is a statutory or legislative privilege and not a constitutional privilege.

Town of Lafayette v. Clark, 9 Ore. 277.

United States v. Wonson, 1 Gal. 5, 28 F. Cas. No. 16,750.

The Schooner Constitution v. Woodworth, 1 Scam. 512.

Montfort v. Hall, 1 Mass. 443.

Brown v. Brown, 81 N. W. 627.

III.

The requirements of a notice of appeal should be strictly observed.

Comstock v. Tea Garden Packing Co., 156 S. W. 818, citing Brown on Jurisdiction, Section 41.

IV.

Notice of appeal is in the nature of a judicial process.

Weitzman v. Handy, et al., 1 Alas. 658.

United States v. Larson, 2 Alas. 578.

Kingsbury v. Pacific Coal and Transportation Co., 3 Alas. 41.

Driver v. McAllister, 1 Wash. Terr. 368.

Cooper v. Northern Acc. Co. 93 S. W. 871.

V.

The Alaska Courts from an early day have required a strict observance of the requirements in regard to notices of appeal and undertakings on appeal.

Weitzman v. Handy, et al., 1 Alas. 658, from the First Division, decided October, 1902.

United States v. Larson, 2 Alas. 578, from the Second Division, decided November 17, 1905.

Kingsbury v. Pacific Coal and Transportation Co., 3 Alas. 41, from the Second Division, decided on April 21, 1906.

United States v. Florence, 1 Alaska 676, decided December 8, 1902.

United States v. Sheep Creek John, 1 Alaska 682, decided December 8, 1902.

VI.

If the undertaking on appeal had not named the crime of drunkenness on a public street as the crime with which defendant was charged, it would have been void.

Belt v. Spaulding, 17 Ore. 130, 20 Pac. 827.

And for the same reasons the notice of appeal in this case should have specifically set forth the crime of drunkenness in the public streets.

VII.

Section 2527 of the Compiled Laws of Alaska of 1913 provided that "upon a plea other than a plea of guilty if the defendant do not then demand a trial by jury, the justice must proceed to try the issue." It is incumbent under such section for the defendant to demand a jury trial and if he does not do so, it is the duty of the Court to try the case without a jury.

People v. Cook, 45 Hun. 34.

State v. Mills, 39 N. J. Law (10 Vroom) 587.

People v. Luczak, 10 Misc. Rep. 590, 32 N. Y. Supp. 219.

State v. Larger, 45 Mo. 510.

State v. Wiley, 82 Mo. App. 61.

State v. Ill., 74 Ia. 441, 38 N. W. 143.

State v. Denoon, 34 W. Va. 139, 11 S. E. 1003.

State v. Alderton, 50 W. Va. 101, 40 S. E. 350.

Dailey v. State, 4 Ohio State 47.

VIII.

A waiver of a jury trial in a misdemeanor case is not obnoxious to any constitutional right.

Schick v. United States, 195 U. S. 65.

Belt v. United States, 4 App. Dec. 25.

In Re Belt, petitioner, 159 U. S. 95.

Hallinger v. Davis, 146 U. S. 314.

Ex Parte Dunlap, 5 Alas. 521.

Commonwealth v. Dailey, 12 Cush. (Mass.) 80.

Murphy v. Commonwealth, 1 Metc. (Ky.) 365.

Tyra v. Commonwealth, 2 Metc. (Ky.) 1.

State v. Kaufman, 51 Iowa 578, 2 N. W. 275, 33 Am. Rep. 148.

Connelly v. State, 60 Ala. 89, 31 Am. Rep. 34.

State v. Worden, 46 Conn. 349, 33 Am. Rep. 27.

People v. Rathbun, 21 Wend. (N. Y.), 509, 542.

IX.

Section 2559 of the Compiled Laws of Alaska provides as follows:

> "That when an appeal is dismissed the appellate court must give a judgment as it was given in the court below, and against the appellant, for the costs and disbursements of the appeal. When judgment is given in the appellate court against the appellant, either with or without trial of the action, it must also be given against the sureties in his undertaking according to the nature and effect thereof."

Judgment in the present case was given in accordance with the directions and authority of said section. It is merely providing for the docketing of the judgment of the justice court in the same manner as a judgment found in a justice court may be docketed in the District Court. See Sections 1813 and 1814, of the Compiled Laws of Alaska, 1913. Under said law it is mandatory to render said judgment.

Kaiser v. Gardiner, 211 S. W. 883.

With cases cited.

ARGUMENT.

SECTION 15 OF THE ALASKA TERRITORIAL PROHIBITION LAW IS IN EFFECT

The charging part of the complaint in this case is as follows:

> "The said John Koppitz in the Territory of Alaska, and within the jurisdiction of this Court, did, wilfully and unlawfully, on the 31st day of May, 1920, at Cordova, Alaska, be found drunk on the public streets, to-wit: in said Town of Cordova, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America."

This complaint is based upon Section 15 of the Alaska Prohibition Law, Act of Congress, of February 14, 1917, which went into effect on January 1, 1918, and which reads as follows:

> "That any person who shall in or upon any passenger coach, street car, boat, or in or upon any other vehicle commonly used for the transportation of passengers, or in or about any depot, platform, or waiting room drink any intoxicating liquor of any kind, or any person who shall be drunk or intoxicated in any public or private road or street, or in any passenger coach, street car, or any public place or building, or at any public gathering, or any person who shall be drunk or intoxicated and shall disturb the peace of any person, shall be guilty of a misdemeanor."

While it is claimed that the Alaska Prohibition Act is superseded by the National Prohibition Act in nearly all of its features, still it is our contention that Section 15 of the Alaska Prohibition Act is untouched and unimpaired by the National Prohibition Act. There is no provision in the Volstead Act covering the crime of public drunkenness, or drunkenness of any kind, and the rule of construction is that before a subsequent law will repeal a former law by implication there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy as was stated by Justice Story in the early case of *Wood v. U. S.,* 16 Pet. 362.

In the case of *Witte v. Shelton,* 240 Fed. 265, considered and decided by the Circuit Court of Appeals for the Eighth Circuit, the question arose as to whether Section 238 of the United States Penal Code was repealed by the Act of March 1, 1913, commonly known as the Webb-Kenyon Act, and in said case it was held that to effect a repeal of a statute by implication by reason of inconsistency with a latter statute there must be such a positive repugnancy between the two statutes that they cannot stand together.

Arthur v. Homer, 96 U. S. 137.
Gowen v. Harley, 56 Fed. 973.

It was held in the *Witte-Shelton* case that there was no inconsistency between the two acts that were under consideration, although they both related to the transportation of intoxicating liquors. In the present case there is nothing in the Volstead Act which refers in any way to the crime of public drunkenness.

There is no direct repeal in the Volstead Act of the Territorial Law hereinbefore referred to, and there could not be a repeal by implication for the reason that the latter does not in any manner refer to or cover the subject of Section 15 of the Territorial Prohibition Act, and, therefore, the rule as laid down by Justice Storey, in any circumstances, would apply to the effect that if there be a repeal of the Territorial Act by the Volstead Act it must only be *pro tanto* and could not and would not apply to Section 15 covering the crime of public drunkenness.

THE RIGHT OF APPEAL IS NOT A CONSTITUTIONAL RIGHT.

The principal matter to be considered by this Writ of Error is whether the notice of appeal is sufficient to confer jurisdiction upon the District Court. Preliminary to that discussion it may be well to consider in a general way the right of appeal.

The right of appeal and to try a case *de novo* is a

creature of the statute, and is not a matter of constitutional right. This matter of the right of appeal is discussed in the *Town of Lafayette v. Clark,* 9 Ore. 227, in which arose the question as to whether the charter of the Town gave a right of appeal from the Recorder's Court. In discussing the general right of appeal in said case Judge Waldo declared:

> "Appeals for the removal of causes from an inferior to a superior court for the purpose of obtaining trials *de novo,* are unknown to the common law, and can only be prosecuted where they are expressly given by statute.
>
> *The Schooner Constitution v. Woodworth,* 1 Scam., 512.)
>
> "In *United States v. Wonson,* 1 Gal. 5, Mr. Justice Story says that the word appeal comes from the civil law, and as a mode by which a cause may be retried on the facts, is a privilege existing by statute, and not by common law, and is considered by our courts as a mere legislative and not a constitutional privilege. He further says that many learned men have regarded its transfer into our system as a mischievous novelty."

In the latter case of *United States v. Wonson,* found in 28 Fed. Cas. No. 16750, the case of *Monkfort v. Hall,* 1 Mass. 443, is cited in support of the proposition that a right of appeal is not a constitutional privilege. Being in derogation of common law, the

party seeking to avail himself of the privilege of appeal must comply strictly with all of the provisions of the statute conferring that right. See *Brown v. Brown,* 81 N. W. 627. And in *Comstock v. The Tea Garden Packing Co.,* 156 S. W. 818, speaking on appeals the Supreme Court of the State of Missouri lays down very clearly the strict rules which govern the manner and conditions that are essential to an appeal, in the following language:

> "In *McGinnis & Ingels Co. v. Taylor,* 22 Mo. App. 513, 516, the court said: 'The appellee may have actual knowledge of an appeal being taken. He may stand by and see it perfected, yet he must have the statutory notice, and this notice must describe the cause in which the appeal is taken. If the appellee's knowledge of the appeal does not affect the matter, it would seem that evidence aliunde the notice showing that the appellee understood to what the notice referred should be rejected.' Brown on Jurisdiction Sec. 41, speaking of notice and service says: * * * * 'Where it provides a form, or gives directions as to the manner of service, * * * the statute must be complied with strictly; the direction is mandatory. Great particularity is required in the notice of appeal. * * * * * * It is a thing apart from the knowledge which the party to be notified may have. * * * Appellee may have actual knowledge of an appeal being taken. He may stand by and see it perfected, yet he must have the statutory notice, and this notice describe the cause in which the appeal is taken.' "

STRICT RULE OBSERVED IN ALASKA.

In Alaska there are particular reasons for the strict observance of the requirements of the statute. Congress in providing laws for Alaska gave the United States Commissioners acting ex-officio as Justices of the Peace considerable additional jurisdiction to that which a Justice of the Peace ordinarily has in the States, both in regard to civil matters and over criminal offenses. In civil matters a Commissioner as shown by Sections 366 and 1534 of the Compiled Laws of Alaska, 1913, a considerable jurisdiction for the recovery of money or damages, and specific personal property, and for several other matters to the extent of one thousand dollars. In criminal matters, as shown by Section 2519, he has jurisdiction of any misdemeanor punishable by imprisonment in the county (federal) jail, or by fine or both. In other words he has jurisdiction of any crime other than where the punishment would be imprisonment in the penitentiary. In granting such jurisdiction it will be seen that Congress took into consideration the conditions and difficulties of such an immense Territory as Alaska. As an illustration the Third Division of the Territory of Alaska contains an area of 162,000 square miles. Some commissioners therein are located at distances of two thou-

sand miles from the seat of the District Court, and nearly all the Commissioners are from one hundred to five hundred miles away from said headquarters of the District Court. Under such circumstances it was the manifest purpose of Congress that the Commissioners should deal with the great majority of the cases arising in their districts, and that their judgments should be generally final. As an illustration a laborer might have an action for his wages or upon some contract, or a man in any walk of life might have an action in contract for money due him, and he could recover the same by action in the Commissioner's Court to the jurisdictional limit of $1000.00. If an appeal would be an easy matter the defendant in such case could cause infinite delay by taking an appeal, and possibly by such delay render such judgment inoperative, or by causing such an immense expense in the way of bringing witnesses for great distances and other expenses of trial, he could possibly prevent the plaintiff from prosecuting the case in the upper court.

In the case of *United States v. Hardy,* 186 U. S. 227, the Supreme Court of the United States seemed to have a very clear insight into and appreciation of the difficulties which impede litigation in the far northern territory, and while the remarks in that

case were applied to the question of continuance of a trial, they also shed light on the difficulties in the review of such trials in appellate courts, and in the way of procuring witnesses for trial in the lower courts.

The Supreme Court says:

> "Under these circumstances it seems to us clear that the court did not abuse its discretion in refusing a continuance. It is true the trial was held in a remote part of the Nation, and where facilities for securing the attendance of witnesses were not as great as in more thickly settled portions; but it is also true that many of the witnesses for the government were engaged in prospecting, men without settled abodes, and whose attendance at subsequent terms it might have been difficult to secure, and it must have been perfectly obvious to defendant and his counsel that the longer he could postpone the trial the greater the probability of the absence of witnesses against him. It was the right of the court to consider all these matters."

For these reasons, from the very beginning, Courts in Alaska in the different Divisions have adopted the strict rule in regard to the privilege of appeal, and have required notices of appeal and undertakings on appeal to be in strict conformity with the requirements, at the expense of the dismissal of such appeals if such strictness was not observed. There are a great many cases which have been de-

cided in Alaska dismissing appeals for void and improper notices and undertakings following the rules which were adopted in the courts in the early days from the different Divisions of Alaska, which rules are enunciated in cases reported as follows:

Weitzman v. Handy, et al., 1 Alas. 658, from the First Division, decided October, 1902.

United States v. Larson, reported in 2 Alas. 578, decided on November 17, 1905, from the Second Division.

Kingsbury v. Pacific Coal and Transportation Co., reported in 3 Alas. 41, from the Second Division, decided on April 21, 1906.

And *United States v. Florence* 1 Alas. 676, *United States v. Sheep Creek John,* 1 Alas. 682, both from the First Division on the matter of a void undertaking, decided December 8, 1902.

In all of these cases it is held that the notice of appeal is in the nature of a judicial process, following Jacobs, Judge, in *Driver v. McAllister,* 1 Wash. Terr. 368, and other cases.

As was said in *Weitzman v. Handy,* 1 Alas. 660:

> "The notice of appeal provided by our statute is in the nature of a process whereby this

court obtains jurisdiction of cases appealed: that is, the giving of the notice is a preliminary step to be taken, and, if followed by other steps required by law, this court thereby obtains jurisdiction of the case. Being in the nature of a process, it should, I think, as clearly describe the parties, the nature of the judgment sought to be appealed from, the date on which such judgment was entered, the court in which entered, and the court to which appeal is taken, as a *summons* is required to indicate the *nature* of the action, the court in which brought, the parties to the action, and the amount sued for, when issued from the district court."

And as was said in *United States v. Larson,* 2 Alaska, 579:

"As this notice is a special of a judicial process, the sufficiency thereof must appear to the court on its face. The question for consideration is not whether the notice is sufficient to carry to the appellee or district attorney knowledge of the intention to appeal. The question rather is: Can the court, from a reading of the notice, determine what particular judgment or conviction was rendered; whether of larceny, assault, or other crime, by name or description."

And in *Kngsbury v. Pacific Coal and Transportation Company,* 3 Alas. 43, it is held:

"A notice of appeal from a commissioner's court is a species of judicial process (*Driver v. McAllister,* 1 Wash. T. 368), whose sufficiency must appear to the court on its face. The notice of appeal must be adequate, and there must be proper service thereof, or this court acquires

no jurisdiction of the person. In these particulars the notice bears a strong resemblance to a summons. The statute requires that in an action for the recovery of money or damages the summons shall state what sum judgment must be taken for upon default, and in other actions the summons must state that upon default of the defendant to answer the plaintiff will apply for the relief demanded. Section 44, Code Civ. Proc. Alaska. There is no reason why the process which summons the defendant into the commissioner's court should designate the judgment that will be taken upon default, while the process which brings the respondent into this court upon appeal and brings a proceeding *de novo* should be less specific. The purpose of the notice of appeal is to apprise the respondent of the institution of the appeal in a particular case. In passing upon a motion of this kind the court cannot consider any supposed actual knowledge alleged to exist in the mind of the respondent as to an action previously tried in the commissioner's court as supplementing in any manner the facts set forth in the notice of appeal. The sole question is: Does the notice of appeal on its face disclose such facts that the law will arbitrarily infer actual notice would be given even to a stranger?"

And further in the same case it is said:

"We concur with Judge Brown in *Weitzman v. Handy,* 1 Alaska, 658, and with the dissenting opinion of Dunbar, C. J., in *State ex rel Maltby v. Superior Court of Spokane County,* 7 Wash. 223, 34 Pac. 922, in suggesting that there may be more than one judgment rendered in the same court on a certain day and between the same parties. True, such might be unusual; but the rule

of law must cover the ordinary as well as the exceptional."

As we have said these cases at an early date in the juridical history of Alaska laid down the rule of strict procedure in cases of appeal on account of the peculiar conditions in the Territory, recognized both by Congress, and by the Courts, which had practical experience in the difficulties attending the administration of the law.

The privilege of appeal is not denied, but not being a constitutional right, but a statutory privilege, these early cases established a uniform rule in harmony with existing conditions, which rule has been consistently followed in numberless cases which have not been reported.

In the present case the notice of appeal gives the amount of the sentence and the costs, and describes that it is from a conviction under the Alaska Bone Dry Law, without giving any of the particular crimes that are enumerated and denounced by the law. In the first place, there is no such law known as the Alaska Bone Dry Law. It may be a familiar term used to designate the Act of Congress of February 14, 1917, although that law is not exactly bone dry as it permits the use of certain kinds of intoxicating liquors for scientific, artistic or mechanical

purposes, and for compounding and preparing medicines, and the shipment of wines for sacramental purposes. As we have said there were two laws in effect at the time the conviction in this case took place, viz., the Volstead Act, and the Act of Congress of February 14, 1917, and neither of these acts can be specifically designated as a Bone Dry Act. However, if we recognize the familiar designation of said Act of February 14, 1917, the notice does not refer to any particular crime which is denounced by that act. That act in Section One sets forth: "That it shall be unlawful for any person to manufacture, sell, give, or otherwise dispose of any intoxicating liquor or alcohol of any kind in the Territory of Alaska, or to have in his or its possession or to transport any intoxicating liquor or alcohol in the Territory of Alaska unless the same was procured and is so possessed and transported as hereinafter provided."

The conviction in this case is not under the general provisions of the act, but under a special provision of the act known as Section 15, which provides as follows:

> " * * * * or any person who shall be drunk or intoxicated in any public or private road or street, or in any passenger coach, street car, or any public place or building, or at any public

gathering, or any person who shall be drunk or intoxicated and shall disturb the peace of any person, shall be guilty of a misdemeanor."

It will be seen that it is an entirely separate and distinct offense from the crime which is described generally in the first section of said act. The complaint in this case, in its charging part, sets forth that the offense to which the accused pleaded not guilty and of which he was found guilty, to-wit, that he was found drunk on the public streets in the said town of Cordova, Alaska. Our contention is that the crime is not described by a mere reference to the Bone Dry Law or even reference to the Act of Congress of February 14, 1917, known as the Bone Dry Law. Each offense, to sell, manufacture, give or otherwise dispose of, transport, and have in possession liquor, would be a separate offense under said law, and if there would be a conviction under the same would have to be separately described in any complaint or notice of appeal, and it would not be a proper designation of any such crimes to describe it as a violation of the Bone Dry Law, or merely the Act of February 14, 1917. But in this case the crime is still more a distinctive one in that it is, as we have stated ,a separate crime in that law, set forth in an entirely distinct section and not connected with anything that is denounced as a crime in section one of

that act. It is as separate as larceny, or assault, or other crime from one another, as is mentioned and is required by the rule as set forth by *United States v. Larson,* 2 Alas. 579. In *Kingsbury v. Pacific Coal and Transportation Co.,* 3 Alaska, 46, it is suggested that there may be more than one judgment rendered in the same court on the same day between the same parties, and there might easily be a violation of which a defendant might be convicted on the same day of each the several offenses set forth in the Act of Congress of February 14, 1917.

We claim and contend that it was necessary to describe the crime with which he was charged in the complaint, to which he pleaded not guilty, for which he was tried and found not guilty, to-wit, the crime of public drunkenness as denounced by Section 15 of said Act, and in describing in the notice of appeal the crime of which he was convicted it was necessary to set forth that it was public drunkenness. To show that that is necessary we will refer to the undertaking which was filed in this same case on the appeal from the Justice's Court to the District Court. It will be seen that the undertaking, setting forth the condition alone and omitting the other parts of the same, reads as follows:

"The conditions of the above undertaking are

such, that whereas, the said John Koppitz was, on the second day of June, 1920, in the above-entieled action and in the above-entitled court, before the Hon. R. H. L. Noaks, U. S. Commissioner and ex-officio Justice of the Peace in and for the Cordova Precinct, Third Division, Territory of Alaska, duly convicted of the crime of violating the Alaska Bone Dry Law, *by being drunk in the public streets,* in violation of an act entitled, 'To prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes, enacted by the Congress of the United States of America, and approved February 14, 1917, and upon said conviction it was ordered and adjudged by the said U. S. Commissioner and ex-officio Justice of the Peace, that the said John Koppitz be fined the sum of Two Hundred and Fifty ($250.00) Dollars and costs of the action taxed at $25.05, or be imprisoned in the Federal Jail not exceeding one hundred and twenty-five days.''

If the undertaking had not set forth that it was for the crime of being drunk in the public streets in violation of the Act of Congress of February 14, 1917, it would have been invalid. In *Belt v. Spaulding,* 20 Pac. 827, it was held by the Supreme Court of the State of Oregon that an undertaking of bail, taken before a magistrate must state briefly the specific nature of the crime charged, and that an undertaking which described the offense for which the defendant must appear and answer, by a general or familiar name failed to describe any offense as defined or made punishable by the Laws of the State of Ore-

gon, and for that failure, the undertaking in that case was declared to be void. We have cited that case merely to show that the undertaking in this case would have been invalid and unenforceable if it had not set forth the crime of drunkenness, and inasmuch as the notice on appeal is a judicial process, there is a stronger reason that there should be a specific and technical description of the crime in the notice of appeal. This rule is strictly in accordance with the holdings and decisions of the Alaska Courts from an early day, for the reasons which we have hereinbefore pointed out.

THE TRIAL COULD BE HAD BEFORE THE COURT WITHOUT A JURY.

The next point which may be assigned as error is that the court tried this case without a jury, which procedure invaded the constitutional rights of the defendant. The statute under which the Justice proceeded is found in Section 2527 of the Compiled Laws of Alaska, 1913, and reads as follows:

> "That upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the Justice must proceed to try the issue."

It was incumbent upon the defendant to demand a jury trial under that statute, and it appears nowhere in the proceedings that he made any such de-

mand. If any such demand had been made it was incumbent upon the defendant to require the Justice by any proper proceedings to have the same appear, and in the absence of any steps taken by the defendant of that nature, it must be presumed that no demand had been made. Under Section 1834 of said Compiled Laws of Alaska, the appellant in a civil case must file within a certain number of days a transcript of cause, and reasoning by analogy if there is any absence of the record the duty would fall upon the appellant in this case to see that the record was a correct one.

Coming to the question as to whether the court could try the case and if it was the duty of the court to try the case, under said Section 2527, there are statutes in different States of the Union of a similar nature, and the decisions of the courts in these states will illuminate this phase of the question. There is a similar statute in the State of New York, and in *People v. Cook,* 45 Hun. 34, the court held as follows:

> "Code Cr. Proc. Sec. 202 relating to proceedings in Courts of Special Sessions provides that before the evidence is heard defendant may demand a trial by Jury, and Sec. 701 that if defendant do not demand such trial the Court must proceed to try the issue. Defendant pleaded not guilty, and on being asked by the court if he was ready for trial he replied that he was, and the

court proceeded to try him forthwith, without objection on his part. Held, that this was a consent to be tried by the Court."

In the case of *People v. Luczak,* 10 Misc. Rep. 590, 32 N. Y. Supp. 219, it is held:

"Under Code Cr. Proc. Sec. 701, which provides that, if defendant in a court of special sessions 'do not demand a trial by jury the court must proceed to try the issue,' judgment of a conviction in a case tried without a jury is not defective merely because *it omits to show* that the defendant did not demand a jury."

In the case of *State v. Mills,* 39 N. J. Law. (10 Vroom) 587, it is held:

"The right to a jury trial is waived by defendants who were present at the trial before a Police Justice and permitted the case to be tried without intimating any desire for a Jury."

In the case of *State v. Larger,* 45 Mo. 510, it is held:

"If defendant in a misdemeanor case was unwilling to be tried by the Court, he should have objected at the time, and it is too late on appeal to object that he was not tried by a Jury."

In the case of the *State v. Wiley,* 82 Mo. App. 61, it was held:

"Where defendant, indicted for a misdemeanor, went to trial without a jury on a plea of former adjudication, and without objection to a

trial by the Court, such objection cannot be raised on appeal, since defendant will be presumed to have waived his right to a jury trial."

In the case of *State v. Ill.,* 74 Ia. 441, 38 N. W. 143:

> "Under a statute which provided 'Upon a plea other than guilty if the defendant do not demand a trial by jury, the justice must proceed to try the issue unless a change of venue be applied for by the defendant,' it was held 'It will be noticed that the proper manner of trying a case of this kind in justice's court is to try by the justice, unless a jury is demanded by the defendant. In other words, if he fails to demand a jury he waives the right to be tried by one.' "

And in the case of *State v. Denoon,* 34 W. Va., 139, 11 S. E. 1003, in which the defendant was charged by indictment for selling spirituous liquors without a license, and which case was tried by the court in lieu of a jury, the Supreme Court of West Virginia held that in a misdemeanor case there may be a trial by the court in lieu of a jury where neither party requires a jury. This was approved in another liquor case, *State v. Alderton,* 50 W. Va. 101, 40 S. E. 350, in which the accused was charged with having owned and kept intoxicating liquors, with intent to sell the same contrary to law.

See also *Dailey v. State,* 4 Ohio State, 47.

WAIVER OF A JURY TRIAL IN MISDEMEANOR CASES PROPER.

It will appear from an inspection of these cases that several of them construed statutes which were exactly the same as Section 2527 of the Compiled Laws of Alaska, and the construction placed upon such statute, or one of that nature, is that the failure to demand a jury trial on the part of the defendant is tantamount and equivalent to a waiver of such jury trial. But it may be further contended that there could not be a waiver of a jury trial in this case, and that such waiver is in violation of the constitutional right of the defendant. Fortunately there has heretofore been a full discussion of this phase of the question in this Third Division of Alaska, and an exhaustive opinion has been delivered by the Court in the case of *ex parte Dunlap* found in 5 Alaska, 521, after a thorough argument had been heard and a complete examination of the question had been made. The decision in that case was to the effect that there could be a waiver of a jury trial in a case arising for a violation of the liquor laws of the Territory of Alaska as then existing, said violation being a misdemeanor in that case the same as it is in the present case. The question is of such importance that it is proper that a copious quotation from the opinion of

the Judge should be given in order to show the strength, reason and cogency of the Court's argument.

"The Court says:

"In *Schick v. United States,* 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, I. Ann. Cas. 585, the Court, speaking by Mr. Justice Brewer, says:

' And it is a well known fact that in many territories organized by Act of Congress, the Legislature has authorized the prosecution of petty offenses in the police courts of cities without a jury. But if there be no constitutional or statutory provision or public policy requiring a jury in the trial of petty offenses, upon what ground can it be contended that a defendant therein may not voluntarily waive a jury? Can it be that a defendant can plead guilty of the most serious, even a capital offense, and thus dispense with all inquiry by a jury, and cannot when informed against for a petty offense, waive a trial by jury? Article 6 of the Amendments, as we have seen, gives the accused the right to a trial by jury. But the same article gives him the further right 'to be confronted with the witnesses against him' 'and to have the assistance of counsel.' Is it possible that an accused cannot admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel, and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privi-

lege which he is given the right to enjoy. Authorities in the state courts are in harmony with this thought. In *Commonwealth v. Dailey,* 12 Cush. (Mass.) 80, the defendant in a misdemeanor case waived his right to a full panel and consented to be tried by eleven jurors and this action was sustained by the Supreme Court of Massachusetts. Chief Justice Shaw, delivering the opinion of the Court said (page 83): 'He may waive any matter of form or substance excepting only what may relate to the jurisdiction of the court.' The same doctrine was laid down in *Murphy v. Commonwealth,* 1 Metc. (Ky.) 365, *Tyra v. Commonwealth,* 2 Metc. (Ky.) 1, and *State v. Kaufman,* 51 Iowa 578 (2 N. W. 275, 33 Am. Rep. 148.) In *Connelly v. State,* 60 Ala. 89, (31 Am. Rep. 34), a statute authorizing the waiver of a jury was sustained. The same rule was made in *State v. Worden,* 46 Conn. 349 (33 Am. Rep. 27), which was a case of felony. See also, *People v. Rathbun,* 21 Wend. (N. Y.) 509, 542. We are of the opinion that the waiver of a jury by the defendants in these cases and the consent to trial by the Court was not in conflict with law, and the judgments are therefore affirmed.'

In the Schick case there was no statute (as there is in the case at bar) authorizing the waiver of a jury trial, and Mr. Justice Harlan in his long dissenting opinion in that case (195 U. S. at page 81, 24 Sup. Ct. at page 832 (49 L. Ed. 99, 1 Ann. Cas. 585), says:

'If, in analogy to the powers exercised by the Parliament of England prior to the adoption of our Constitution, it should be held that Congress could treat the particular crime here in question as a petty offense triable by the

> court, without a jury, or with a jury of less than twelve persons, it is sufficient to say that Congress has not legislated to that effect in respect of the offenses charged against these defendants, or of any other offense defined in the acts relating to oleomargarine. If it has the power to do so, Congress has not assumed, directly or indirectly, to withdraw such offenses from the operation of the constitutional provision that the trial of all crimes, except in cases of impeachment, shall be by jury. And the question is whether, in the face of that explicit provision and in the absence of any statute authorizing it to be done, the court, a jury being waived, had jurisdiction to try the accused for the crime charged.'

In *Belt v. United States,* 4 App. D. C. 25, a reference to which is found in 24 Cyc. 151, note 26, it is said:

> 'The weight of authority seems to be that, in the absence of express statutory authority, no accused person can waive a right of trial by jury in a criminal case; it being maintained that nothing can be waived which is jurisdictional or fundamental, or the observance of which is required by public policy; but if authorized by statute, the right to such trial may be waived.'

This case went on appeal to the Supreme Court of the United States and was there affirmed. In *re Belt, Petitioner,* 159 U. S. 95, 15 Sup. Ct. 987, 40 L. Ed. 88. See, also, *Hallinger v. Davis,* 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986.

A very interesting discussion of this subject is found in the case of *State v. Cottrill,* 31 W. Va. at page 202, 6 S. E. at page 449, where Snyder, Judge, says:

'The whole history of English and American jurisprudence has been searched in vain to find a single precedent holding a statute unconstitutional which permits the accused in misdemeanor cases to waive a jury.'

A later case, *State v. Griggs,* 34 W. Va. 78 11 S. E. 740, approves the opinion of Judge Snyder.

The old distinctions of the common law are rapidly disappearing, and so far as they are a clog and hindrance on the practical administration of justice in this country they cannot disappear too fast.

'The law is a progressive science', said the Supreme Court of the United States in *Holder v. Hardy,* 169 U. S. 385, 18 Sup. Ct. 383, 42 L. Ed. 780.

The statute in question (Section 2527, Compiled Laws of Alaska), authorizing the waiving of a jury in misdemeanor cases, has been in operation in Alaska since 1899, and in Oregon, from whence it was taken, since 1864. During all these years innumerable cases have arisen and been disposed of under it, and no reported decision is found where its constitutionality has ever been questioned, until the case of *Virch v. Bishop, supra.* This long acquiescence alone is entitled to great weight in determining its validity, as well as other well-settled rules of statutory construction.

'Legislative construction of constitutional provisions, adopted and acted on with the acquiescence of the people for many years, is entitled to great weight with the courts, and will not be disturbed, except for manifest error.' *Stuart v. Laird,* 1 Cranch, 299, 2 L. Ed. 115,

followed in *U. S. v. Midwest Oil Co.,* 236 U. S. 473, 35 Sup. Ct. 309, 59 L. Ed. 673.

> 'An Act of Congress will not be declared void, except in a clear case. Every possible presumption is in favor of the validity of the statute, and this continues until the contrary is shown beyond a rational doubt'. Sinking Fund case, 99 U. S. 718, 25 L. Ed. 496.

It is well known that in the immense and sparsely settled regions of Alaska it is often difficult and expensive to procure a jury of twelve men in courts of justices of the peace, in isolated places; and those charged with offenses often prefer to waive trial by jury rather than submit to the delay incident to procuring a jury. Again, this waiver may, and often does, operate to the advantage of an accused in that he may avoid the taxing of the costs of the jury against him in case of a verdict of guilty.

In 8 Cyc. p. 733, it is said:

> 'A construction which must necessarily work great public and private mischief must never be preferred to a construction which will work neither, or neither in so great a degree, unless the terms absolutely require such a preference.'

> 'In all such cases of construction, it should be borne in mind that broad questions of expediency and sound public policy are not to be overlooked.'

While a statute manifestly unconstitutional will not be upheld, on the ground either of long acquiescence or of expediency and public policy, these considerations are still entitled to weight.

What is there in the contemptible business of

'peddling' or 'bootlegging' whiskey to remove it from the class of petty offenses? For a first offense, under Section 2581, *supra,* the minimum penalty is a fine of $100. Ordinarily this would be sufficient punishment for a first offense, with the hope of the reformation of the offender. But why should one, taking advantage of his own wrongdoing, after wilfully and recklessly defying the law, on conviction a third time, be shielded within the sanctuary of the Constitution? In all police courts habitual and incorrigible offenders are summarily sentenced to such long terms in jail as the exigencies of the case and the character of the prisoner require. Why should unlawful pandering to vicious and depraved appetites be dignified and raised to a higher degree of crime than that alleged against the victim and consumer, when later charged with being 'drunk and disorderly'? Echo answers, 'Why'?

The power of Congress to make regulations for controlling the liquor traffic in the territories had never been questioned.

> 'The police power is an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government. It is inherent in the states of the American Union, and is not a grant derived from or under any written Constitution.' 6 Ruling Case Law, Sec. 182.

The determination of this case requires the exercise of 'practical common sense,' the 'rule of reason,' freed from the trammels of the old common-law distinctions between the degrees of crimes as characterized hundreds of years ago under vastly different conditions.

An observation made by that great lawyer, Mr. Elihu Root, on the occasion of the American

Bar Association meeting, October 20, 1914, may be of interest:

> 'The special class to which is committed the guardianship of the law always drifts away in time from the standards of the plain people, whom they serve, always becomes subtle, technical, over-refined, and the forms which they originally adopted to facilitate the process of getting at substantial justice come to be themselves the subject of controversy which obstructs the way of justice.'

Fortunately the spirit of enlightenment and liberal reason is abroad in our land, and a recent decision of the Supreme Court of the United States does much to clear away that mist of over-refinement and subtlety which has so often thwarted and defeated justice. Mr. Justice Day, in the case of *Garland v. Washington,* 232 U. S. at page 545, 34 Sup. Ct. at page 457 (58 L. Ed. 772), says:

> 'Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we

> think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the Crain case.'
>
> The case over-rules *Crain v. United States,* 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, on the ground that the want of a formal arraignment did not deprive the accused of any substantial right and 'that the right sustained in a former case involving criminal procedure is no longer required for the protection of the accused.'
>
> Thus are we finding, indeed, that the law is 'a progressive science, making for the surer protection of the innocent, and the swifter and more certain punishment of the guilty.' "

It will be seen, therefore, that under all these authorities it was proper for the court to proceed with the trial when no demand was made for a jury trial, in conformity with the express and controlling provision of the statute in this case.

DISTRICT COURT HAS JURISDICTION TO RENDER JUDGMENT AFTER DISMISSAL OF APPEAL.

The further matter to be considered is whether the District Court upon the dismissal of the appeal had jurisdiction to render a judgment which is virtually a repetition of the judgment rendered by the justice's court, with the addition of the costs accruing on appeal. In the absence of a statute empowering the District Court upon the dismissal of the appeal to render a judgment such as has been rendered in this case, it may be conceded that there would be no jurisdiction in the District Court to render such judgment. In such case, after the appeal would be dismissed there would be no question but the judgment of the Justice Court would remain intact and in force. But in the present case there is a statute directing that after a dismissal in such case a judgment should be entered. This statute is found in Section 2559 of the Compiled Laws of Alaska of 1913, and is as follows:

> "That when an appeal is dismissed the appellate court must give a judgment as it was given in the court below, and against the appellant, for the costs and disbursements of the appeal. When judgment is given in the appellate court against the appellant, either with or without trial of the action, it must also be given against the sureties

in his undertaking according to the nature and effect thereof."

Our contention is that the statute is mandatory and if the District Court had failed to render such a judgment it might have been ground for error. The question arises then whether such statute is void and unconstitutional as rendered without jurisdiction and not affording a hearing to the defendant, or is the statute to be given effect, and if so what are the reasons for giving it effect. True, the District Court has no right to render a judgment other than the one that was given in the Justice's court, except in the matter of costs, but it seems an analogy with other statutes that such a statute would not be void and would confer upon the upper court the power to render such judgment. To give this statute effect would not be in the nature of rendering a judgment without notice, without a hearing to the defendant, without due process of law, and would not be obnoxious to any constitutional right or guaranty. As we have said, if there was no statute the judgment in the Justice's court would remain unimpaired. Now this statute simply gives the right to the District Court to transfer the judgment of the Justice's court to the docket of the District Court.

Sections 1813 and 1814 of the Compiled Laws of

Alaska, provides for the transfer of a judgment and the effect to be given to such transfer from a Justice's court to the District Court. Such sections read as follows:

> "Sec. 1813. Whenever a judgment is given in a justice's court in favor of anyone, for the sum of ten dollars or more, exclusive of costs and disbursements, the party in whose favor such judgment is given may, within one year thereafter, file a certified transcript thereof with the Clerk of the District Clerk, and thereupon such Clerk shall immediately docket the same in the judgment docket of the District Court."
>
> "Section 1814. From the time of docketing a judgment of (in) a District Court, as provided in the last section, the same shall be a lien upon the real property of the defendant, as if it were a judgment of the District Court wherein it is docketed."

By virtue of these sections full effect is given in the dockets of the District Court to judgments which have been obtained in the Justice's court without giving any further notice to the defendant affected by such judgments, or without any further proceedings than the transfer of the judgment, which transfer is a special right given by virtue of the statute alone. This effect is all that we claim by virtue of Section 2559, *supra*. It simply gives the District Court the right under the statute to transfer the judgment of the Justice's court into the docket of the

District Court. It is a statutory right and is not assailable on any constitutional ground any more than are Sections 1813 and 1814 to which reference has been made, which sections have never been so far as our knowledge extends, objected to on any grounds of invalidity. If Sections 1813 and 1814 were not in effect then it is undoubted that the judgments of the Justice's court could not be placed upon the docket of the District Court, and could not be enforced from that court. In like manner, if there was no such statute as Section 2559, *supra,* upon dismissal of an appeal there would be no authority to transfer the judgment of the Justice's court to the District Court. The transfer is made by reason of the statute, and as we have contended, such statute does not invade any constitutional right, and its rendition is mandatory on the District Court. Section 2559 gives the District Court the right to impose the additional costs of the appeal, but this would be a proper allowance to be made by the District Court as a penalty on the dismissal of the appeal. The District Court has a certain jurisdiction in hearing an appeal where there is a void notice as we claim there is in the present case. The matter of the motion for the dismissal must be heard, and is a matter which is entirely within the jurisdiction of the District Court.

To that extent the appeal is within the District Court's jurisdiction and it would be proper and natural that the Court would have the resultant right to award the additional costs in such case.

We have not observed any cases in which this statute has been construed or discussed, but it seems to us that the construction for which we contend here would sustain the statute, would be entirely in accordance with its intention and purpose, and would not result in conferring any other jurisdiction on the Court except for the transfer of the judgment from the Justice's court to the District Court. There seems to be a statute of similar import in the State of Missouri.

It seems that the statute of Missouri, known as Section 7584 in that State, as shown by the case of *Kaiser v. Gardiner,* 211 S. W. 883, reads as follows:

> "The appellant shall fail to give such notice at least ten days before the second term of the appellate court after the appeal is taken, or the judgment shall be affirmed, or the appeal dismissed, at the option of the appellee."

That case then holds:

> "Absent the timely notice of appeal, then by section 7584 respondent has the absolute right to control the disposition of the case, and at his option the appeal shall be dismissed or the judgment affirmed. The section is mandatory. *Scien-*

tific American Club v. Horchitz, 128 Mo. App. 575, 106 S. W. 1117; *Butler v. Pierce,* 115 Mo. App. 40, 90 S. W. 425; *Wolff v. Coffin,* 46 Mo. App. 192; *Hammel v. Weiss,* 54 Mo. App 16."

This case would seem to us to be in support of our contention as to the proper interpretation and construction of Section 2559, and that it was mandatory to repeat the judgment of the Justice court, adding thereto the costs of appeal, as provided by the statute.

CONCLUSION.

In conclusion, we have shown that Section 15 of the special prohibition law having application to the Territory of Alaska is in effect; that said section is a particular section defining the crime or offense of public drunkenness and making it a misdemeanor; we have shown that the right of appeal is a statutory or legislative privilege as contradistinguished from a constitutional right; that the notice of appeal as provided by our statute is in the nature of a judicial process and all the requirements of the statute should be strictly followed; that the practice of the courts in Alaska from a very early time, in passing on notices of appeal, has been to require strict observance of all of the conditions on account of the peculiar situation and difficulties attending the administration

of justice; that the defendant in the present instance was convicted of the crime of drunkenness in the public street of Cordova, Alaska, and that while the undertaking on appeal set forth that such was the offense, the notice of appeal did not describe the specific crime *eo nomine* and such notice was, therefore, void. We have further shown that under Section 2527 of the Compiled Laws of Alaska of 1913, it was proper and the duty of the Justice to proceed with the trial without a jury when no jury was demanded, and that a failure to demand a jury trial was tantamount to a waiver thereof and that there is no constitutional objection to a waiver of a jury trial in a misdemeanor case; and finally it was proper and mandatory upon the District Court upon the dismissal of the appeal to render a judgment as was given in the court below against the appellant, and for the costs and disbursements of the appeal in accordance with the provisions of Section 2559 of the Compiled Laws of Alaska of 1913; and in view of our contentions and the authorities which we have cited, we respectfully ask that there be an affirmance of the judgment rendered by the District Court in this case.

Respectfully submitted,

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United States Attorney.